No. 80-5060

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

LONNIE JOE CARTER - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

On Writ of Certiorari to the Supreme Court of Kentucky

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Did the Fifth and Fourteenth Amendments to the United States Constitution require the state court, in this case, to grant the defendant's request to instruct the jury that "the defendant is not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way."?

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IN THE

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LONNIE JOE CARTER - - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF KENTUCKY

BRIEF FOR RESPONDENT

OPINION AND JUDGMENT BELOW

The judgment in this case was entered by the Christian County, Kentucky, Circuit Court, on June 1, 1979. (Joint Appendix, hereinafter A, 9-10).

JURISDICTION

The opinion of the Kentucky Supreme Court was rendered on May 13, 1980, and is not reported. (A 73, 74).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Fifth and Fourteenth Amendments to the United States Constitution. Petitioner has also made mention of the Sixth Amendment.

COUNTERSTATEMENT OF THE CASE

After a jury trial, petitioner was found guilty of third degree burglary in violation of Kentucky Revised Statute (hereinafter KY. REV. STAT.) 511.040 and was sentenced to two years' imprisonment.[1] In the second phase of the bifurcated trial, petitioner was found guilty of being a persistent felony offender and his sentence was enhanced to twenty years' imprisonment. (A 9).[2] Petitioner's prior felonies included "Store-

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[1]KY. REV. STAT. 511.040 at the time of the crime stated: "(1) A person is guilty of burglary in the third degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime. (2) Burglary in the third degree is a Class D felony." A Class D felony is punishable by not less than one nor more than five (5) years imprisonment. KY. REV. STAT. 532.060 (2)(d).

[2]KY. REV. STAT. 532.080 states in part: "(3) A persistent felony offender in the first degree is a person who is more than twenty-one years of age and who stands convicted of a felony after having been convicted of two or more felonies. . . . * * * (6) A person who is found to be a persistent felony offender in the first degree shall be sentenced to imprisonment as follows: . . . (b) If the offence for which he presently stands convicted is a Class C or Class D felony, a persistent felony offender in the first degree shall be sentenced to an indeterminate term of imprisonment, the maximum of which shall not be less than ten

(Footnote continued on next page)

house Breaking" in 1973 in violation of KY. REV. STAT. 433.190 (the statute has since been replaced by a criminal code in Kentucky) and "Knowingly Receiving Stolen Property over a Hundred dollars ($100)" in 1977, in violation of KY. REV. STAT. 514.110(a)(3), (4).

Officer Deborah Ellison, of the Hopkinsville Police Department, was on patrol on December 22, 1978, at approximately 1:50 a.m., in downtown Hopkinsville. (A 18). She observed two black males along the side of a building in an alley. She shined her spotlight down the alley and, when she did so, the individuals began running. When the officer drove her cruiser down the alley she saw a hole had been knocked in the side of a building housing Young's Hardware. There were two coats lying at the scene of the crime and some other items which she believed came from the store. (A 19). Officer Ellison called for Officer Leroy Davis, who she knew was in the area, alerting him as to the direction in which the individuals were running. (A 19, 30).

Officer Leroy Davis was sitting in his car near the alley when he heard Officer Ellison give out a call that there were two black males running towards Fifth Street. He saw them when they came out of the alley and, after a chase apprehended petitioner and placed

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(Footnote continued from preceding page)
years nor more than twenty years. (7) A person who is found to be a persistent felony offender in the first degree shall not be eligible for probation, shock probation, or conditional discharge, nor for parole until having served a minimum term of incarceration of not less than ten years."

him under arrest. (A 37, 38).[3] One of the individuals Officer Ellison saw running from the scene carried with him some type of gym bag. (A 23). During the chase petitioner dropped two items that were in his hands. (A 38). One of the items was a bag and the other item was a radio that was set on a police band, and in which he would have been able to hear communications between the police department and patrol cars. (TE 40). The radio had an ear phone that could be placed in the ear. *Id.* Even though it was cold that night (A 23), when apprehended petitioner did not have on an outer coat. (A 41). Although Officer Ellison did not get a close look at the face of the man in the alley, she was able to testify that petitioner fit the description of one of the individuals she had seen. (A 36). Petitioner wore rather distinctive looking clothing, which Officer Ellison testified was the same type of clothing the individual had on when she first discovered him in the alley. (A 36).

It was shown that partial entrance to Young's Hardware Store was gained though the hole in the wall. Items which were on a storage rack inside of the building were pulled from the hole in the wall and taken to the outside of the building where they were found on the ground along with the coats. (Transcript of Evidence of State Court Trial, hereinafter TE, 80, 81). (A 20).

Petitioner was read his *Miranda* rights and presented with a form for his signature. He stated at

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[3]The other individual apparently escaped.

that time that he did not want to make a statement and refused to sign the form. (A 24, 25). In a later conversation, a police officer asked petitioner if he intended to take the "rap" alone or if he wanted to implicate the other individual. Petitioner responded by stating that there was no individual other than himself and that both of the jackets found at the scene were his. (A 49).

During the voir dire of prospective jurors, the trial judge stated the following:

> ". . . The fact that this man is under a charge or has been indicted has no weight against him as evidence. It is not evidence of his guilt and is not to be considered by you as evidence of his guilt. It is simply a part of the court process which starts, as I have said, the wheels turning to get the case started to be tried. It means nothing more than that. He sits there before you today presumed by the law to be as innocent as anyone else in this court room. I want you to fully understand that. Sometimes it is not easy to do, but you are to put out of your mind the fact that he is accused of this crime to the point where you will not consider him in any way guilty until and unless the Commonwealth meets its burden and by that I mean the Commonwealth must prove his guilt to your satisfaction beyond a reasonable doubt and if they fail to do that, you should find him not guilty. . . ." (A 14, 15)

During his opening statement counsel for petitioner stated to the jury:

> ". . . I suppose that most of you would issue a true bill if Mr. Ruff [the prosecutor] told you what he has just told you and you didn't have a chance to hear what the defendant had to say for himself. Now, that is just completely contrary to our system of law. A man, as the judge has already told you, a person is innocent until they are proved guilty and that's the duty of the prosecutor, to prove beyond a reasonable doubt to you that this man is guilty of the crime for which he is charged. . . .
>
> So I ask you to remember one thing, that this is your duty as a citizen of this country being on the jury and remember that our system and probably the cornerstone of it allows, or says that a person is innocent until they are proved guilty. . . ." (A 16, 17).

After the Commonwealth announced closed, the trial court held a conference with counsel and petitioner outside of the hearing on the jury for the purpose of determining which of petitioner's prior felony convictions could be used for impeachment purposes pursuant to the directives of the Kentucky Supreme Court in the case of *Cotton* v. *Commonwealth,* Ky., 454 S. W. 2d 698 (1970). Two prior felonies from a list of ten or more were chosen with the permission of the court to be used for impeachment purposes should petitioner choose to take the stand. (A 54-57). Petitioner offered no witnesses or testimony on behalf of the defense. The court then instructed the jury on third degree burglary and stated:

> "The law presumes a defendant to be innocent of a crime, and the indictment shall not be considered as evidence or as having any weight against him. You shall find the defendant not guilty *unless you are satisfied from the evidence alone,* and beyond a reasonable doubt, that he is guilty. If upon the whole case you have a reasonable doubt that he is guilty, you shall find him not guilty." (A 8). [Emphasis added.]

Petitioner offered the following instruction, which was refused by the trial court:

> "The defendant is not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way." (A 5).

During closing argument counsel for petitioner explained why his client had not taken the stand in the following manner:

> "Ladies and gentlemen of the jury, I am sure you all right now are wondering well what has happened? Why didn't Mr. Carter take the stand and testify? Let me tell you. The judge just read to you that the man is presumed innocent and that it is up to the prosecution to prove him guilty beyond a reasonable doubt. He doesn't have to take the stand in his own behalf. He doesn't have to do anything. . . ." (A 60).

Later counsel for petitioner returned to the same explanation by stating:

> "You know I don't know what happened out there that night. Lonnie Carter says that he is innocent.

> That is what he says when he says that I am not guilty and he doesn't have to get on that stand to say it. 'I didn't do it', he says, by saying that he is not guilty. . . ." (A 63).

After deliberation the jury returned, finding petitioner guilty and recommending a penalty of two years in the penitentiary. (TE 127). Having found the petitioner guilty during the burglary phase of the trial, evidence was then introduced during the second phase of the case involving the allegation that appellant was a persistent felony offender. After witnesses presented the jury with rather routine testimony concerning petitioner's date of birth and the time spent in the penitentiary concerning the felony convictions in question (TE 133-137), the Commonwealth closed this phase of its case. During the Persistent Felony Offender phase of the case, counsel for petitioner asked no questions of the witnesses and petitioner offered no evidence in his behalf. *Id.* Petitioner apparently admitted being a persistent felony offender, for, in closing argument, counsel for petitioner stated to the jury that petitioner could not contest the fact that he had had the two previous felony convictions. Instead he asked the jury through their "grace and mercy" to set a minimum sentence. (TE 139). After hearing the evidence, the jury returned with a verdict of guilty and recommended punishment at twenty years' imprisonment. (TE 143). Judgment was accordingly entered. (A 9, 10).

After conviction petitioner appealed to the Kentucky Supreme Court. Petitioner complained of some

nine (9) different allegations of error, including the one issue presented to this court on the petition for certiorari. On May 13, 1980, the Supreme Court of Kentucky rendered its opinion which is not to be published and which affirmed the conviction. (A 73). The Supreme Court of Kentucky ruled that each of the allegations of error was without merit. In concluding that the trial court did not commit error by refusing an instruction to the jury regarding the appellant's right not to testify, the court pointed to Kentucky Revised Statute 421.225, which provides:

> "In any criminal or penal prosecution the defendant, on his own request, shall be allowed to testify in his own behalf, but his failure to do so shall not be commented upon or create any presumption against him."

The court cited its previous decision in *Green* v. *Commonwealth,* Ky., 488 S. W. 2d 339 (1972) as controlling on this issue. (A 77, 78).

SUMMARY OF ARGUMENT

Since 1903, the appellate courts in Kentucky have consistently held that a "no inference" instruction is not in the best interests of the accused. Kentucky courts have reasoned that to give the "no inference" instruction would do violence to the Kentucky legislature's intention of fully protecting the rights of an accused standing as a defendant on trial. The courts held that the "no inference" instruction would violate the Kentucky statute which states that a defendant's

silence in a criminal prosecution shall not be commented upon or create any presumption against him.

The congress enacted a federal statute which permitted the defendant to testify but did not contain the Kentucky language that the failure to testify shall not be commented upon. In interpreting the federal statute this court held that the failure to give the instruction in a federal case was error. The court later held that a state prosecutor and trial court were not permitted to make comment on a defendant's failure to take the stand and testify. Finally, in that chain of cases, the court held that it was not error for a state trial judge to give a "no inference" instruction over the objection of a defendant. The question of whether a defendant in a state criminal trial proceedings could constitutionally require the instruction was specifically reserved by the court and is the subject of this appeal. Respondent contends that nothing in the Constitution requires the instruction.

The Fifth Amendment originated in England as a weapon against forcing a defendant to give evidence against himself on pain of incarceration, banishment, or mutilation. The lurid realities which lay behind the enactment of the Fifth Amendment are a far cry from the subject matter of this case. The Constitution does not require the instruction in state court proceedings. Such a requirement would be an overextension of the concepts behind the adoption of the Fifth Amendment.

The wisdom of whether the "no inference" instruction should be given is not at issue in this case. States should be free to formulate their own rules to protect

their citizens in criminal court proceedings provided such rules do not violate the United States Constitution. The suggestion that a criminal defendant is coerced into testifying or in some way suffers harm when the "no inference" instruction is not given is unfounded and assertions to this effect are speculative. Interpretation of constitutional requirements should not be based upon such speculative assertions.

The evidence of petitioner's guilt in this case was overwhelming. Petitioner was caught near the scene and made statements which incriminated him. While it is urged by respondent that the Fifth Amendment does not require the "no inference" instruction in state court proceedings, it is also pointed out that even if such an instruction were required, any error that might have been committed would have been harmless beyond a reasonable doubt.

The trial in this case was meticulously fair to petitioner. The court emphasized during voir dire that petitioner was presumed by the law to be as innocent as anyone else in the courtroom and that unless the Commonwealth met its burden of proof beyond a reasonable doubt, petitioner should be found not guilty. After the evidence was presented the court instructed the jury that they should judge a case only on the evidence that was presented at trial. In substance, petitioner therefore received the instruction he was seeking. Petitioner's alternate argument that under the facts of this case there is a Fourteenth Amendment violation is therefore without merit.

Finally, petitioner's suggestion that he failed to testify in this case because he would have had to admit prior felonies which were part of the second phase of the bifurcated proceedings is not substantiated by the record. During the second phase of the trial petitioner did not cross-examine any of the witnesses and in effect admitted that he had been convicted of committing the prior felonies.

It is therefore apparent that neither the Fourteenth nor the Fifth Amendments to the United States Constitution was violated by petitioner's conviction.

ARGUMENT

THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION DID NOT REQUIRE THE "NO INFERENCE" INSTRUCTION IN THIS CASE.

A. The Fifth Amendment Does Not Require the Trial Court to Instruct the Jury That No Adverse Inference Should Be Drawn From the Defendant's Silence At Trial.

The Fifth Amendment privilege against self-incrimination developed in England as a weapon against torture and unjust incarceration of an accused.[4] An accused under the Star Chamber proceedings was coerced into giving evidence, for if he declined to answer questions, he did so on pain of incarceration, banishment, or mutilation. These lurid realities which

[4]Note, *Prosecutorial Comment and Judicial Instruction on a Defendant's Failure to Testify: In Support of a Liberal Application of the Fifth Amendment.* 13 VALPARAISO UNIVERSITY LAW REVIEW 261 (1978).

lay behind enactment of the Fifth Amendment are a far cry from the subject matter of the case *sub judice.* [*Dissent, Griffin* v. *California,* 380 U. S. 609, 620 (1965)]. The abuses of Star Chamber type proceedings more than justified inclusion in the Constitution of a provision guaranteeing an accused's right to remain silent. Modern day justice in the courts of Kentucky and other states do not require an overreaction and extension of the theory giving rise to the amendment.

As early as *Wilson* v. *United States,* 149 U. S. 60 (1893), this court noted a preference for silence on a defendant's decision not to testify at trial. Being concerned that the jury might impose an adverse presumption against the defendant for remaining silent, this Court stated:

> "To prevent such presumption being created, comment, especially hostile comment, upon such failure must necessarily be excluded from the jury. *The minds of the jurors can only remain unaffected from this circumstance by excluding all reference to it.*" *Id.,* at 65. [Emphasis added].

In *Bruno* v. *United States,* 308 U. S. 287 (1939), the court had before it the "narrow question" of whether a federal statute required a federal trial court to instruct the jury upon request that the failure of the defendant to take the stand and testify in his own behalf does not create any presumption against him. The court held that an accused should be allowed to make his own choice of whether such an instruction should be given when an ". . . act of congress au-

thorizes him to choose." *Id.,* at 294. The Fifth Amendment was not involved.

The extent to which the defendant has control over the giving of such instruction was seen as a matter which was subject to regulation, either by the courts or by a statute. The federal jurisdiction is governed by 18 USC §3481. The Commonwealth of Kentucky is governed by Ky. Rev. Stat. 421.225. Each jurisdiction remains free within constitutional limitations to formulate rules regarding silence and failure to testify. *Jenkins* v. *Anderson,* —— U. S. ——, 100 S. Ct. 2124, 2130, 65 L. Ed. 2d 86 (1980). It should be noted that the federal statute stated an accused's failure to make a request to testify shall not create any presumption against him. The Kentucky statute which gave rise to the Supreme Court of Kentucky's decision in this case, however, (Kentucky Revised Statute 421.225) states that an accused's failure to testify ". . . shall not be commented upon or create any presumption against him." The federal statute in question in *Bruno, supra,* and the Kentucky statute are therefore not identical, since the Kentucky statute specifically prohibits comment on an accused's failure to testify.

After *Bruno,* this Court took up the question of whether the Fifth Amendment prohibits adverse comment on the defendant's failure to take the stand and testify. The Court in *Griffin* v. *California,* 380 U. S. 609 (1965), held that a provision of the California Constitution which permitted both the prosecuting attorney and the court to comment on an accused's failure to explain or deny by his testimony any evidence or facts in the case against him was violative of the

Federal Constitution. In the present case, while petitioner makes some passing comment in his brief that the prosecutor made indirect comments about petitioner's failure to testify, there was no direct comment made on the failure to testify and the *Griffin* issue is not a central issue in this case. As indicated by *Griffin,* an unconstitutional penalty arises from the trial court or the prosecutor focusing the jury's attention on the defendant's failure to testify.[5] No such focusing can occur by compliance with the Kentucky statute and judicial requirements. In a footnote the court in *Griffin, supra,* specifically stated:

> "We reserve decision on whether an accused can require as in *Bruno* v. *United States* . . . that the jury be instructed that his silence must be disregarded." *Griffin, supra,* at 615 n6.

That issue is now before the court. To be consistent with the previous decisions of this court the method of jury instruction herein should be left to the state.

Griffin was followed by *Lakeside* v. *Oregon,* 435 U. S. 333 (1978). In *Lakeside* the court held that when a trial judge gave the "no inference" instruction over the objection of a defendant, there was no error. The court noted that there had been debate over the years as to whether it is better to give a cautionary instruction of this type or whether it is better to say nothing about a defendant's silence. The court touched on the gravamen of this case by stating:

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[5] "What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another. . . ." *Griffin* v. *California,* 380 U. S. 609, at 614.

> "It may be wise for a trial judge not to give such a cautionary instruction over a defendant's objection. *And each state is, of course, free to forbid its trial judges from doing so as a matter of state law.* . . ." (Emphasis added).
> *Lakeside* v. *Oregon,* 435 U. S. at 340.

The issue before the court in this case is whether the giving of the "no inference" instruction is a constitutional right within the discretion of the defendant. *Lakeside,* in holding that the defendant could not *prevent* such an instruction, answered that question in the negative. This Court should again answer that issue in the negative by holding that the defendant cannot *require* such instruction to be given in violation of a state statute. The Kentucky rule in *Green* v. *Commonwealth, supra,* need not be the same as the Federal rule in *Bruno* v. *United States supra*

> ". . . [R]eview by this court of state action expressing its notion of what will best further its own security in the administration of criminal justice demands appropriate respect for the deliberate judgment of a state in so basic an exercise of its jurisdiction." *Cupp* v. *Naughten,* 414 U. S. 141, 149 (1973), quoting from *McNabb* v. *United States,* 318 U. S. 332, 340 (1943).

B. The Highest Courts in Kentucky Have Consistently Held That the "No Inference" Instruction Is Not in the Best Interest of the Accused.

There have been some twelve cases decided by the highest appellate court in Kentucky on the issue of

whether a "no inference" instruction should be given.[6] In each of these cases the Kentucky courts evidenced their desire to protect the defendant's Fifth Amendment rights.

The earliest reported Kentucky case on this issue is *Tines* v. *Commonwealth*, 25 Ky. 1233, 77 S. W. 363 (1903). In the *Tines* case, the court condemned an instruction which would have stated that the jury shall not draw any presumption from the defendant's failure to testify. The court noted that such an instruction would direct the jury's mind to the fact that the defendant had not testified in his own behalf and the defendant is entitled to absolute silence on his failure to testify.

The rationale of *Tines* v. *Commonwealth, supra,* continued almost unchanged through six more cases.[7] In *Spencer* v. *Commonwealth,* Ky., 467 S. W. 2d 128 (1971), the court held that since the defendant in that

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[6]Prior to January 1, 1976, the highest appellate court in Kentucky was known as the Court of Appeals. After that date the highest appellate court became the Supreme Court of Kentucky. Judges of the former Court of Appeals automatically became the Justices of the Supreme Court of Kentucky, pursuant to Judicial Amendment of the Kentucky Constitution.

[7]*Armstrong* v. *Commonwealth,* 190 Ky. 217, 227 S. W. 162 (1921); *Hanks* v. *Commonwealth,* 248 Ky. 203, 58 S. W. 2d 394 (1933); *Roberson* v. *Commonwealth,* 274 Ky. 49, 118 S. W. 2d 157 (1938); *Kelley* v. *Commonwealth,* 300 Ky. 136, 187 S. W. 2d 796 (1945); *Hopper* v. *Commonwealth,* Ky., 371 S. W. 2d 646 (1963); *Farmer* v. *Commonwealth,* Ky., 461 S. W. 2d 551 (1970). In *Kelly* v. *Commonwealth, supra,* the court through dicta indicated the instruction should have been given under the factual situation of that case.

case did not request the instruction there was no error in the failure to give it. It reaffirmed the belief that the instruction would do more harm than good, but indicated through dicta that the defendant was entitled to such instruction when it was requested. The same judge who wrote the opinion in *Spencer* v. *Commonwealth* likewise wrote the opinion in *Scott* v. *Commonwealth,* Ky., 495 S. W. 2d 800 (1972). In *Scott* the court made it clear that the language in *Spencer* v. *Commonwealth* was mere dictum and stated:

> "In fact, the author of *Spencer* is now the author of the opinion in the instant case, which all goes to prove that a careless foxhound may sometimes lead the whole pack astray. We now repudiate the dictum in *Spencer, supra.*"

The court held that the appellant in that case was not entitled to an admonition pertaining to his failure to testify in his own behalf. *Scott* v. *Commonwealth,* 495 S. W. 2d at 802.

Scott v. *Commonwealth* was followed by *Dixon* v. *Commonwealth,* Ky., 478 S. W. 2d 719 (1972), which merely reiterated the *Scott* principle. In 1972, the Kentucky Supreme Court handed down the decision in *Green* v. *Commonwealth,* Ky., 488 S. W. 2d 339 (1972), which was the foundation for the opinion of the Supreme Court of Kentucky in the case *sub judice.* In *Green,* the Supreme Court of Kentucky interpreted the Kentucky statute [Ky. Rev. Stat. 421.225 (1)] as prohibiting comment by the prosecutor, the

trial court, or anyone else. The court distinguished *Bruno* v. *United States,* 308 U. S. 287, 60 S. Ct. 198, 84 L. Ed. 257 (1939), by pointing out that the *Bruno* case interpreted a *federal* "no inference" instruction and noted that the federal state giving rise to the *Bruno* decision failed to contain the final language of the Kentucky statute, ". . . but his failure to do so shall not be commented upon or create any presumption against him." The court stated that to give the "no inference" instruction would do violence to the clear intent of the Kentucky legislature to fully protect the rights of an accused standing as a defendant on trial. Under Kentucky law a defendant is not entitled to a "no inference" instruction. *Id.,* 341, 342.[8]

C. The Instruction's Refusal Did Not Coerce Petitioner Into Testifying in Violation of His Fifth Amendment Rights and He Suffered No Ascertainable Harm as a Result of the Refusal.

At the close of the evidence the trial court refused what petitioner has described as a "prophylactic instruction" in which he requested that the jury be told that no inference of guilt could be assumed from his failure to testify. The court, however, made it clear in its instruction that the jury was to consider only the evidence submitted to it in its decision. The court

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[8]*See also: Coleman* v. *Commonwealth,* Ky., 501 S. W. 2d 583 (1973), which reiterated the holding in *Farmer* v. *Commonwealth, supra,* and *Green* v. *Commonwealth, supra,* as well as *Collins* v. *Commonwealth,* Ky., 396 S. W. 2d 318 (1965); and *Luttrell* v. *Commonwealth,* 554 S. W. 275 (1977) which prohibit comment by defense counsel on the failure to testify.

cautioned the jury that the law presumes the defendant to be innocent and that they were to find the defendant not guilty unless they were satisfied from the *evidence alone* and beyond a reasonable doubt that he was guilty. (A 8). Since they were told that they were to consider only the evidence in the case in determining whether petitioner was guilty, it is apparent that they would have violated this instruction had they considered the fact that petitioner failed to take the stand and testify when they made their determination of his guilt. In substance therefore petitioner received the instruction he was seeking. It cannot be assumed that the jury disregarded the court's instruction that they were to consider only the evidence that was presented to them in reaching their determination.[9]

Petitioner suggests that the failure to give the "no inference" instruction unconstitutionally harms and coerces a defendant into giving up his Fifth Amendment right not to testify. Such an unverified supposition is unfounded. Whether it is better to give the instruction or not is a matter for debate. The wisdom of any given jurisdiction's decision on whether to give the instruction is not at issue. The question is whether the instruction was constitutionally mandated. Constitutional requirements in criminal trials should not be based upon conjecture or questionable assumptions. Before the Kentucky conviction in this case can be

[9]The prosecutor in his closing argument to the jury emphasized to the jury that they were to consider only what they had heard as evidence in the case and noted that they were not to speculate what might have happened or could have happened. (A 64.)

overturned, it must be established not merely that the failure to give the instruction is "undesirable," "erroneous," or even "universally condemned," but that some right guaranteed by the Constitution has been violated. *Cupp* v. *Naughten,* 414 U. S. 141, 146 (1973). Nothing in the procedures under Kentucky law or the conduct of the court was coercive. If anything, the situation in which an accused must defend himself in court is coercive.[10]

Every aspect of a trial may be deemed by a defendant to be coercive.[11] But it does not therefore follow that all aspects of the trial require a constitutionally mandated instruction. Furthermore, since petitioner failed to take the stand and testify, his discussion of coercion is irrelevant to this case.

From the remarks contained in the aforementioned Kentucky cases, as well as the statements appearing in *Lakeside* v. *Oregon, Supra,* and other, similar cases, it is clear that the allegations of harm and prejudice which might occur from refusing the "no inference" instruction are speculative. It is therefore logical to assume that the best course of action is for there to be no comment whatsover concerning the failure to tes-

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[10]As noted by this Court in *Jenkins* v. *Anderson,* ____ U. S. ____, 100 S. Ct. 2124, 2128, 65 L. Ed. 2d 86 (1980):

"... (T)he Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.'"

[11]As noted in the dissent in *Griffin* v. *California,* 380 U. S. 609 at 623, "... No constitution can prevent the aberration of the human mind."

tify.[12] This is the course which the Commonwealth of Kentucky has chosen to take. While some may disagree with this course of action, there is nothing contained in the Fifth, Sixth, or Fourteenth Amendments to the United States Constitution which denies the States the right to choose what they consider to be the best and safest means of protecting an individual against self-incrimination. It is beyond question that the intent of the jurists in Kentucky is to jealously safeguard the defendant's rights against self-incrimination. Therefore while there may be those who disagree with the method chosen to safeguard these rights, there should be no question but what the means that are chosen are reserved to the state.[13]

Petitioner suggests that *Taylor* v. *Kentucky,* 436 U. S. 478 (1978) stands for the proposition that the Fifth and Fourteenth Amendments can be used as a justification for requiring a "no inference" instruction. Petitioner's reliance on *Taylor* v. *Kentucky,* which required a presumption of innocence instruction, is inappropriate, however, since the court was clear that the results that were reached therein primarily

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[12]The Court's silence on a defendant's choice to remain mute does not add to the defendant's risk that his choice might prove to be an error in trial tactics. The Court's silence on the defendant's exercise of his Fifth Amendment privilege did not create any greater pressure upon the defendant to testify than did the comment in *Lakeside* which highlighted defendant's silence.

[13]Should the court hold in favor of petitioner and allow retroactive application of the rule, the floodgates in Kentucky will be open for cases in which other defendants will ask for a retrial because of the same issue.

resulted from the facts in that particular case. As noted by the Court:

> "We hold that *on the facts of this case* the trial court's refusal to give petitioner's requested instruction on the presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment. . . ." [Emphasis added]. *Id.,* at 490.

If there was any question about the holding of *Taylor* v. *Kentucky,* it was laid to rest by the later case of *Kentucky* v. *Whorton,* 441 U. S. 786 (1979). In *Whorton,* this court discussed the *Taylor* holding and stated:

> ". . . [T]he court did not there fashion a new rule of constitutional law requiring that such an instruction be given in every criminal case. Rather, the court's opinion focused on the failure to give the instruction as it related to the overall fairness of the trial considered in its entirety."

After stating that the evidence was weak against the defendant in the *Taylor* case, the court went on to state:

> ". . . [T]he failure to give a requested instruction on the presumption of innocence does not in and of itself violate the Constitution. Under *Taylor,* such a failure must be evaluated in light of *the totality of the circumstances*—including all the instruction to the jury, the arguments of counsel, *whether the weight of the evidence was overwhelming,* and the other relevant factors — to determine

whether the defendant received a constitutionally fair trial." (Emphasis added). *Id.*, at 788, 789.

D. The Evidence of Guilt Was Overwhelming.

The Commonwealth submits the reason why petitioner failed to take the stand in his own defense was because the evidence of his guilt was overwhelming and could not be explained. When Officer Ellison observed the burglars at the hole in the wall of the hardware store, she noticed that one had on a dark colored shirt and rust or orange colored pants, and was carrying some items in his hand. (A 23). When the burglars saw the officer, they began running. After a chase petitioner was apprehended and the clothes he had on matched those worn by the burglar. (A 23). The burglary occurred at approximately 1:50 a.m. on a cold evening, and when petitioner was apprehended he had on no coat. There were two coats lying at the scene of the crime. (A 18, 19). (A 37, 38). During the chase petitioner dropped a gym bag and a radio (scanner) that was set on the local police band. (TE 40). At the police station petitioner admitted that the coats were his and indicated that he intended to take the "rap" alone. (A 49).

Petitioner's statement, coupled with the circumstances and other testimony in this case, points conclusively to his guilt. With proof of this magnitude, the jury could have come to no other conclusion but that petitioner was guilty. While respondent contends that the Fifth, Sixth, and Fourteenth Amendments do not require a court to give the "no inference" instruc-

tion, respondent also contends that if this court should declare that there is a constitutional right upon election of a defendant to require the giving of the instruction, any error that might have been committed in this case was harmless beyond a reasonable doubt. *Chapman* v. *California,* 386 U. S. 18, 172 L. Ed. 2d 705, 87 S. Ct. 824 (1967); *Harrington* v. *California,* 395 U. S. 250, 23 L. Ed. 2d 284, 89 S. Ct. 1726 (1969). Similarly, the "totality of the circumstances" in this case is unlike *Taylor* v. *Kentucky, supra,* where the requested instruction was constitutionally necessary to purge the negative circumstances and thereby insure a fair trial. Cf. *Kentucky* v. *Whorton, supra,* 441 U. S. at 789.

E. Petitioner's Persistent Felony Offender Argument.

Petitioner suggests that his failure to testify in this case had nothing to do with his guilt or innocence, but instead related in some way to the fact that his testimony would be impeached by the prior felonies and he would thereby be admitting guilt in the Persistent Felony Offender portion of the trial.[14] While the two felonies that were chosen for impeachment purposes were the same ones that would be used in the Persistent Felony Offender portion of the trial, there was no suggestion by counsel for petitioner at the time of the hearing on the felonies for impeachment pur-

[14]Appellant's brief, pp. 16, 35-37.

poses,[15] that petitioner objected to the use of those two felonies for impeachment purposes. (A 56-59).

Petitioner literally confessed guilt during the Persistent Felony Offender phase of the trial. As noted, counsel for petitioner did not cross-examine any of the witnesses during their rather routine testimony showing petitioner had violated the Kentucky Persistent Felony Offender statute. He did not take the stand in his own defense during this phase of the trial and he offered no witnesses or evidence. (TE 136-137). During closing argument to the jury on this phase of the trial, counsel for petitioner admitted that petitioner could not contest the fact that he had been convicted of these two previous felonies. (TE 139).

Petitioner's suggestion that he did not take the stand and testify because he would thereby have to admit guilt during the Persistent Felony Offender phase of the trial is a "red herring." Petitioner could not and did not contest the two previous convictions. It is apparent that petitioner did not testify simply because he could not explain to the jury his incriminating statements and what he was doing near the burglarized hardware store in the middle of a cold night without a coat on and carrying a police band radio.

F. Petitioner Received a Fair Trial.

Petitioner contends that even if the Fifth Amendment does not require the instruction, under the facts

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[15]Pursuant to the guidelines established by the Kentucky Supreme Court in *Cotton* v. *Commonwealth*, Ky., 454 S. W. 2d 698 (1970).

of this case the instruction was mandated by the Fourteenth Amendment. Since the trial proceedings were constitutionally fair petitioner's contentions are without merit.

During voir dire the Trial Judge explained to the prospective jurors that petitioner was presumed by the law to be innocent and that the Commonwealth must prove petitioner's guilt beyond a reasonable doubt in order for the jury to find him guilty. (A 14, 15). This was reemphasized by petitioner's counsel during his opening statement. (A 16, 17). The jury was instructed on the presumption of innocence. The Court also instructed the jury that they would find the defendant not guilty unless they were satisfied from the evidence *alone* and beyond a reasonable doubt that he was guilty. (A 8). In his closing arguments the prosecuting attorney emphasized this point by telling the jury that they were to consider only what they had heard as evidence and that they were not to engage in speculation. (A 64).

Counsel for petitioner indicated in his opening remarks that petitioner would have a chance to speak for himself. (A 16, 17). In his closing remarks counsel for petitioner explained to the jury that his client did not have to take the stand in his own behalf. (A 60, 63).[16]

Petitioner complains that the Commonwealth Attorney made numerous references to the evidence being

[16]Counsel for petitioner made this statement to the jury without objection from the prosecuting attorney—see *Collins* v. *Commonwealth* and *Luttrell* v. *Commonwealth, supra.*

"uncontradicted" during closing argument. Although it was noted that items of evidence were uncontradicted, the statements of the Commonwealth Attorney during closing argument did not receive an objection from petitioner. (A 68). Since the prosecutor's remarks were not manifestly intended to point to petitioner's failure to testify and since the jury would not naturally take them as such, the prosecutor's argument was not constitutionally impermissive. *United States* v. *Estrada de Castillo,* 549 F. 2d 583 (9th Cir. 1976).

It is therefore apparent that petitioner's suggestion that his due process rights under the Fourteenth Amendment were violated by the method and manner in which this trial was conducted is completely unwarranted. Both the court and the prosecuting attorney took great pains to insure that petitioner's Fourteenth as well as his Fifth Amendments rights were protected.

CONCLUSION

The Fifth Amendment to the United States Constitution does not require the "no inference" instruction. Since petitioner received a fair trial the Fourteenth Amendment to the United States Constitution was not violated. For the reasons stated above the decision of the Supreme Court of Kentucky should be affirmed.

Respectfully submitted,

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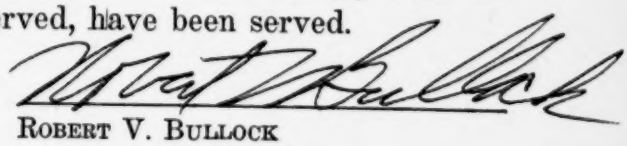
CERTIFICATE OF SERVICE

I, Robert V. Bullock, counsel for respondent, hereby certify that the foregoing Brief for Respondent was served on petitioner by personally mailing three copies each of the same to counsel for the petitioner, Honorable Kevin Michael McNally, Assistant Public Advocate, at his office, State Office Building Annex, Frankfort, Kentucky 40601, this 16th day of December, 1980. I further certify that all parties required to be served, have been served.



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